# Riviera Promotions Sdn Bhd v Genting Perkasa Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22–1187 OF 1997
NALLINI PATHMANATHAN J
12 MARCH 2010

*Contract — Damages — Assessment — Assessment of damages in respect of parties' unreasonable refusal to execute binding agreement — Whether damages recoverable was damages lost by plaintiff as consequence of defendants' refusal to enter into binding contract — Whether damages assessed as if contract had been performed — Specific Relief Act 1950 s 18*

*Contract — Specific performance — Damages in lieu of specific performance — No binding and/or conclusive contract in existence — Damages, how assessed — Whether damages recoverable was damages lost by plaintiff as consequence of defendants' refusal to enter into binding contract — Whether damages assessed as if contract had been performed — Specific Relief Act 1950 s 18*

The defendants entered into negotiations with the plaintiff who was interested in the defendants' proposal to sell off a parcel of land with planning permission for the development of a commercial complex. The parties thereafter executed a memorandum of understanding that provided for further negotiations between the parties. Subsequently, the defendants gave notice that they did not wish to proceed with the transaction. Apparently, some of the defendants had refused to execute the agreements. The plaintiff sought specific performance of the proposed sale agreement. By judgment dated 15 April 2003, the High Court ordered that judgment be entered in favour of the plaintiff and that the defendants pay the plaintiff damages to be assessed by the deputy registrar ('DR'). The DR determined that the plaintiff was only entitled to nominal damages of RM10 since it had failed to prove, on a balance of probabilities, that it had suffered the loss and damage claimed. The plaintiff thus appealed to the judge against this assessment. In the appeal, the defendants contended that damages ought to be assessed from the date of breach right up to the date of judgment, ie 15 April 2003. However, the plaintiff contended that damages should be assessed from the date of judgment and continuing there from until completion of the commercial complex development.

**Held**, dismissing the appeal:

(1) Damages in lieu of specific performance is a remedy granted in place of or

in substitution for specific performance. Section 18 of the Specific Relief Act 1950 envisages that in order to procure specific performance there must be a contract that has come into existence. From the orders and the judgment entered by the High Court, it was clear that the High Court had ordered damages and not specific performance. There was no express finding made to the effect that a binding and conclusive contract was entered into or subsisted between the parties. Indeed, on the evidence there was no binding contract entered into as the 'proposed sale contract' was never executed. Thus, the measure of damages available to the plaintiff could not be premised on the substantial damages in lieu of specific performance formula (see paras 20–21 & 25); *Wroth and another v Tyler [1972 W No 274]* [1974] Ch 30 distinguished; *Malhotra v Choudhury* [1979] 1 All ER 186 distinguished; *Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672 referred; *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 referred.

(2) The plaintiff's and the defendants' contention that there was a binding and valid contract entered into could not and did not make it so. The fact that the High Court specifically did not award specific performance but only granted a prayer for damages did not and could not convert the plaintiff's claim to allow for specific performance of a contract when a contract was not executed between the parties in the first place. The measure of damages was the damages lost by the plaintiff as a consequence of the defendants' refusal to enter into the binding contract. It could not be the measure of damages arising if the contract had been performed. The entirety of the parties' evidence as to the measure of damages payable as if the contract had been performed was entirely erroneous (see paras 25–27 & 29).

(3) The measure of damages ought to be the damages suffered as a consequence of the defendants' unreasonable refusal to execute the agreement which involved the costs and damages incurred during the period up to and including 5 November 1997 when the defendants communicated their intention not to execute the proposed sale agreement. This would normally include all legal and financing costs, time costs and opportunity costs arising from the series of negotiations during that period. However, since there was no evidence of such costs, the plaintiff was entitled to nominal damages of RM10 (see para 29).

(4) Assuming that the plaintiff was entitled to damages in lieu of specific performance, the assessment of damages ought to commence from the date of breach — 5 November 1997 — until the date of the judgment — 15 April 2003. Anything else would render the award of damages speculative (see para 32).

**[Bahasa Malaysia summary**

Defendan-defendan mengadakan perbincangan bersama plaintif yang berminat dengan cadangan defendan-defendan untuk menjual sebidang tanah bersama kebenaran perancangan untuk pembangunan sebuah kompleks komersial. Pihak-pihak kemudiannya menyempurnakan suatu memorandum persefahaman yang memperuntukkan perbincangan lanjut antara pihak-pihak. Kemudiannya, defendan-defendan memberi notis bahawa mereka tidak mahu meneruskan urus niaga tersebut. Nyata bahawa beberapa defendan enggan menyempurnakan perjanjian-perjanjian. Plaintif memohon pelaksanaan spesifik ke atas perjanjian jualan yang dicadangkan. Menerusi penghakiman bertarikh 15 April 2003, Mahkamah Tinggi memerintahkan penghakiman dimasukkan bagi pihak plaintif dan defendan-defendan membayar plaintif ganti rugi ditaksir oleh timbalan pendaftar ('TP'). TP menetapkan bahawa plaintif hanya berhak ke atas ganti rugi nominal RM10 kerana gagal membuktikan, atas imbangan kebarangkalian, bahawa ia mengalami kerugian dan kerosakan yang dituntut. Justeru plaintif menuntut kepada hakim terhadap penaksiran ini. Dalam rayuan tersebut, defendan-defendan menghujah bahawa ganti rugi harus ditaksirkan dari tarikh kemungkiran hingga tarikh penghakiman, iaitu 15 April 2003. Walau bagaimanapun, plaintif berhujah bahawa ganti rugi harus ditaksir dari tarikh penghakiman dan berterusan hingga penyempurnaan pembangunan kompleks komersial.

**Diputuskan,** menolak rayuan:

(1) Ganti rugi sebagai ganti pelaksanaan spesifik merupakan remedi yang diberikan sebagai ganti pelaksanaan spesifik. Seksyen 18 Akta Relief Spesifik 1950 menyatakan bahawa untuk mendapatkan pelaksanaan spesifik perlu adanya kewujudan kontrak. Daripada perintah-perintah dan penghakiman yang dimasukkan Mahkamah Tinggi, adalah jelas bahawa Mahkamah Tinggi telah memerintahkan ganti rugi dan bukannya pelaksanaan spesifik. Tiada penemuan jelas dibuat bahawa suatu kontrak mengikat dan muktamad telah ditandatangani atau wujud antara pihak-pihak. Malah, daripada keterangan, tiada kontrak mengikat yang ditandatangani sebagai 'kontrak jualan yang dicadangkan' disempurnakan. Maka, penilaian ganti rugi yang terpakai kepada plaintif tidak boleh bersandarkan kepada formula ganti rugi substansial sebagai ganti pelaksanaan spesifik (lihat perenggan 20–21 & 25); *Wroth v Tyler* [1974] 1 Ch 30 dibeza; *Malhotra v Choudhury* [1979] 1 All ER 186 dibeza; *Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672 dirujuk; *Tan Sri Khoo & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 dirujuk.

(2) Hujahan plaintif dan defendan-defendan bahawa tiada kontrak yang mengikat dan sah ditandatangani tidak boleh dan sememangnya tidak menjadikannya sedemikan. Fakta bahawa Mahkamah Tinggi tidak secara

khusus mengawardkan pelaksanaan spesifik tetapi hanya memberikan ganti rugi tidak mengubah dan tidak boleh mengubah tuntutan plaintif bagi membenarkan pelaksanaan spesifik suatu kontrak apabila kontrak itu tidak disempurnakan antara pihak-pihak pada mulanya. Ukuran ganti rugi ialah kerugian yang dialami oleh plaintif akibat daripada keengganan defendan-defendan menandatangani kontrak mengikat. Bukannya ukuran kerugian yang berbangkit jika kontrak dilaksanakan. Keseluruhan keterangan pihak-pihak untuk ukuran ganti rugi yang perlu dibayar seperti kontrak telah dilaksanakan adalah salah (lihat perenggan 25–27 & 29).

(3) Ukuran ganti rugi haruslah berdasarkan kerugian yang dialami akibat keengganan tidak wajar defendan-defendan untuk menyempurnakan perjanjian yang melibatkan kos dan ganti rugi dialami sehinggalah dan termasuklah pada 5 November 1997 apabila defendan-defendan menyatakan niat mereka tidak mahu menyempurnakan perjanjian jualan yang dicadangkan. Ini biasanya termasuklah semua kos perundangan dan kewangan, masa dan peluang berbangkit daripada siri perbincangan dalam tempoh itu. Tetapi, disebabkan tiada keterangan terhadap kos tersebut, plaintif berhak ke atas ganti rugi nominal RM10 (lihat perenggan 29).

(4) Dengan anggapan bahawa plaintif berhak kepada ganti rugi sebagai ganti pelaksanaan spesifik, taksiran ganti rugi haruslah bermula dari tarikh kemungkiran, iaitu 5 November 1997 hingga tarikh penghakiman, iaitu 15 April 2003. Selain daripada ini, akan menjadikan award ganti rugi tersebut spekulatif (lihat perenggan 32).]

**Notes**

For cases on assessment, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3356–3363.

For cases on specific performance generally, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5180–5248.

**Cases referred to**

*Malhotra v Choudhury* [1979] 1 All ER 186, CA (distd)

*Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672, HC (refd)

*Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777, FC (refd)

*Tay Book Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433, PC (refd)

*Wroth and another v Tyler [1972 W No 274]* [1974] Ch 30, Ch D (distd)

**Legislation referred to**

Specific Relief Act 1950 s 18

*GB Wong (Izral Partnership) for the plaintiff.*
*Lee Min Choon (Lee Min Choon & Co) for the defendants.*

**Nallini Pathmanathan J:**

INTRODUCTION

**[1]** This is the plaintiff's appeal against the decision of the learned deputy registrar dated 26 February 2008 in respect of assessment of damages in relation to the order of court dated 15 April 2003. In this suit, judgment was entered against the defendants on an adjudication of preliminary issues of law on the following terms:

> This action being called up for trial and upon preliminary issues arising pursuant to order dated 11 August 2000.
>
> It is this day adjudged that the defendants to pay the plaintiff damages in lieu of specific performance to be assessed before the deputy registrar AND that the defendants do pay the plaintiff the costs of this action.

**[2]** The learned deputy registrar adjudicated on the plaintiff's application for an assessment of damages and determined that the plaintiff was entitled to nominal damages of RM10. The reason for so concluding was that the plaintiff had failed to prove, on a balance of probability, that it had suffered the loss and damage claimed of RM20m. It is this award of damages that comprises the subject matter of this appeal.

RELEVANT BACKGROUND FACTS

**[3]** The sixth defendant is a company with an authorised capital of RM5m divided into five million shares of RM1 each of which 2,000,002 shares are issued and fully paid up ('the sale shares'). At all material times, the first to fifth defendants were the beneficial owners of the sale shares. The sixth defendant was also at the time the registered and beneficial owner of three parcels of land in Penang, described for the purposes of this case as parcels A, B and C.

**[4]** The first to fifth defendants were desirous of disposing of parcel A which had the benefit of planning permission for the development on it of an 18 storey commercial complex. They therefore indicated to the promoters of the plaintiff that they were interested in disposing of parcel A together with the rights to the proposed commercial complex. The manner of disposal would be as follows:

(a) the proposed purchaser would acquire full control and ownership of parcel A through the purchase of the sale shares in the sixth defendant;

(b) the consideration for the sale shares in the sixth defendant would be satisfied by the transfer to the first to fifth defendants of office units in the proposed commercial development, the numbers of which were to be negotiated by the parties;

(c) the proposed buyer would undertake the sixth defendant's obligations for the loan taken out by the sixth defendant for parcel A which did not exceed RM5,000,000;

(d) the consideration in (b) relating to the transfer of the office units in the proposed commercial development would be premised on the basis that parcels B and C were contracted for sale to a third party where the first to fifth defendants would designate their own management team to regulate the disposal cum development of parcels B and C to the exclusion of the sixth defendant and the proposed buyer.

**[5]** The plaintiff was interested in the proposal and became the proposed buyer. It entered into negotiations in association with its solicitors with the first to fifth defendants. Arising from such negotiations the parties entered into an agreement entitled a memorandum of understanding which provided for further negotiations between the parties on the quantum for and in respect of the contra office units; the finalisation of the terms relating to the sale shares and the finalisation of hive-down arrangements in respect of parcels B and C.

**[6]** Between late March 1997 and 25 April 1997 the parties through their solicitors confirmed the terms and conditions of the proposed sale agreement and the hive-down agreements. Considerable correspondence was entered into between the parties in this respect. The plaintiff maintains that as of 29 April 1997 the parties had confirmed all material terms of the proposed sale agreement and hive-down agreements.

**[7]** The parties fixed 30 April 1997 at the defendants' solicitors office for the execution of the proposed sale agreement and the hive-down agreement. On that day the plaintiff's representatives were present there together with the second, third and fifth defendants and their solicitors.

**[8]** The parties present proceeded to execute the documents and deposited the same with the defendants' solicitors for stamping and to enable the fifth defendant to execute the same. The fourth defendant was unable to be present as he had sustained an accident whilst on his way to the defendants' solicitors office on that day.

**[9]** Between 30 April 1997 and up to July 1997 the plaintiff was asked to extend time to allow the fourth defendant to recuperate. Notwithstanding the grant of such an extension of time and the recovery of the fourth defendant the

proposed sale agreement and the hive-down agreement were never returned to the plaintiff's solicitors duly completed and executed and stamped.

**[10]** Despite a letter from the plaintiff's solicitors demanding the completion and execution of these documents, the defendants and in particular the second and fourth defendants failed to do so. Instead vide letter dated 8 August 1997 the defendants' solicitors gave notice that the defendants did not wish to proceed with the transaction, particularly the proposed sale agreement. The reason was that some of the defendants did not wish to execute the same. The plaintiff on the other hand remained willing and able to complete its obligations under the two agreements, particularly the proposed sale agreement. The plaintiff sought specific performance of the proposed sale agreement and damages in lieu of specific performance.

**[11]** The first to fifth defendants maintained by way of defence that the memorandum of understanding expressly provided that it was not legally binding on either party until and unless the proposed sale agreement was entered into. In other words it was subject to contract. They also raised several other issues in relation to the terms of the proposed sale agreement and the consideration in kind for the transfer of parcel A. They pointed out that the correspondence between the parties prior to 30 April 1997 were in the nature of negotiations to settle the terms and conditions of the proposed sale agreement. In short they maintained at all times that there was no binding agreement agreed to be entered into between the parties. The proposed sale agreement was never entered into. The sixth defendant simply maintained that as no agreement was entered into, it had no liability to the plaintiff.

**[12]** It was in these circumstances that the court concluded on a trial of the preliminary issues that the plaintiff was entitled to its claim. It is relevant that the precise terms of the judgment of the learned judge Dato' Zulkefli bin Ahmad Makinudin (now FCJ) are as follows:

> … Setelah mengkaji fakta-fakta seperti dalam pliding ini dan setelah mengkaji hujah-hujah peguam plaintiff dan peguam defendan-defendan, saya dengan ini membenarkan tuntutan plaintiff dengan kos bagi perintah-perintah seperti yang dipohon iaitu prayer (3) berhubung dengan ganti rugi dan hendaklah ditaksirkan di hadapan timbalan pendaftar.

**[13]** It is evident from the foregoing that the learned judge only granted prayer (3) of the plaintiff's claim. Prayer (3) of the statement of claim reads as follows:

> (3) damages in lieu of and/or in addition to specific performance; …

**[14]** In short the court did not grant the order of specific performance sought by the plaintiff but only damages in lieu of specific performance.

**[15]** This then brings us to the question of the assessment of damages in lieu of specific performance. At the hearing before the learned deputy registrar the parties elected to have their evidence heard on this issue by way of affidavit evidence. Both parties then filed several sets of affidavits including opposing opinions by experts for either side on the alleged loss and damage suffered by the plaintiff as a consequence of the breach occasioned by the first to fifth defendants in failing to execute the proposed sale agreement. It is relevant that each of the experts, ie the expert for the plaintiff and the expert for the defendants gave diametrically opposing opinions as to the quantum of loss and damage suffered by the plaintiff. The defendants' expert opined that the plaintiff effectively suffered no tenable or tangible loss while the plaintiff's expert was of the view that the loss suffered was in the region of RM20m. Notwithstanding these opposing views, neither the plaintiff nor the defendants sought to cross-examine these deponents on their affidavits. That however is a secondary matter.

**[16]** The other relevant facts in relation to this matter are that the proposed commercial project was never carried out by the sixth defendant. It revoked the sale and purchase agreements of all units under the project that had earlier been sold. Then in September 1997 parcel A was sold to one Diamond Paradise Sdn Bhd. Parcel A remains undeveloped to this day and the project was never carried out.

**[17]** The plaintiff however on the basis of a report produced by Messrs Khong & Jaafar dated 6 July 2005 contends that the plaintiff suffered damages of RM24.6m as at 28 April 1997 or 7 November 1997 and in the sum of RM20m as at 15 April 2003. The first set of dates relates to the date of the breach of contract. 7 November 1997 reflects the date of the breach as it was on 5 November 1997 that the defendants communicated their refusal to perform the SPA. As for 15 April 2003, it reflects the date of the judgment. The plaintiff seeks damages to be assessed as of the date of judgment ie 15 April 2003 or alternatively at the date of breach, ie 7 November 1997.

**[18]** In the course of the hearing of this appeal, both parties indicated to the court that they were on common ground in respect of the following issue: The assessment of damages was to be premised as of the date of the grant of the judgment ie 15 April 2003. This was in keeping with the principle that unlike the normal case of a breach of contract, in cases where specific performance or damages in lieu of specific performance was granted, the relevant date for assessment would be the date when the court finally granted judgment.

**[19]** The defendants contend that damages should be assessed as at the date of judgment ie 15 April 2003. They maintain that damages can only be assessed by looking at the profitability of the business from the date of breach which is the date it should be transferred to the plaintiff, up to the date of judgment. In other words the defendants contend that the measure of damages should be assessed from the date of breach up to and until the date of judgment. The plaintiff on the other hand contends that damages should be assessed from the date of judgment and going forwards, as if the contract had been performed as of 15 April 2003 and continuing therefrom until the completion of the proposed commercial project on parcel A several years later. It is here that the two parties differ in their submissions as to the assessment of damages.

**[20]** It appears to this court that a considerable degree of confusion and misapprehension has arisen in the course of this hearing in relation to the issue of assessment of damages on this basis. Damages in lieu of specific performance is a remedy granted in place of or in substitution for specific performance. Specific performance, in accordance with s 18 of the Specific Relief Act provides that 'any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance'.

**[21]** Clearly the section envisages that in order to procure specific performance, there must be a contract which has come into existence. Put another way, specific performance of a contract is not possible where there is no contract in existence. In the instant case it is relevant that the High Court did not award specific performance of the proposed sale agreement as sought by the plaintiff. The court instead awarded, as set out above, damages to be assessed by the deputy registrar. In fact a reading of the order dated 15 April 2003 discloses that the precise terms of the order read as follows:

> AND it is further ordered that judgment be entered in favour of the Plaintiff for the Defendants to pay to the Plaintiff damages to be assessed before the Deputy Registrar.

**[22]** There is therefore no mention of specific performance. Indeed the issue for consideration is whether the court has jurisdiction to order specific performance of a contract which has not been entered into by the parties. In most cases relating to specific performance, the parties have entered into a binding contract, after which one party reneges and refuses to complete the same. In such circumstances the innocent party sues the defaulting party for wrongful refusal to complete the contract, seeking specific performance. However it is clear that in all these cases there is an underlying contract that has been entered into between the parties. It is quite different where the parties have not entered into a contract. If the two parties, in the exercise of their free

will, refuse or fail to enter into a contract, can they be forced to enter into a contract and thereafter fulfil the same? This would run counter to the principle of the freedom to contract. As such it is in cases where the parties have entered a binding and valid agreement and then refused to perform the same that specific performance comes into play. This is borne out, inter alia, by the case of *Wroth and another v Tyler [1972 W No 274]* [1974] Ch 30 where the defendant and the plaintiffs *exchanged contracts* whereby the defendant agreed to sell his bungalow where he lived with his wife and child, to the plaintiffs with vacant possession for 6,000 pounds. Prior to completion however the defendant's wife registered a notice of her rights of occupation vis a vis the property. The defendant did not succeed in persuading her to remove the notice from the register so that the sale could proceed successfully. Accordingly he could not perform on the concluded contract entered into between himself and the plaintiffs. The plaintiffs sought specific performance and damages in lieu of or in addition to specific performance together with other relief. The court finally determined that specific performance would not be the correct remedy and ordered instead damages in lieu of specific performance. In assessing the quantum of damages the court held that where damages were awarded in substitution for specific performance the court was empowered to award damages which would put the plaintiffs into as good a position as if the contract had been performed, even though to do so would mean awarding damages assessed by reference to a period subsequent to the date of breach of the agreement. The plaintiffs were entitled to considerable damages because having regard to the rise in house prices that would place them in the same position as if the contract had been performed.

**[23]** It is evident that in the foregoing case the parties had actually entered into a binding and valid contract that the defendant subsequently could not perform. That entitled the plaintiffs to damages in lieu of specific performance to be assessed on a basis that would place them in a position as if the contract had been performed.

**[24]** Again in *Malhotra v Choudhury* [1979] 1 All ER 186 the plaintiff sought specific performance of the terms of an option comprising a part of the partnership deed executed between himself and the defendant. There the plaintiff was one of two partners in a medical practice of which the senior resided at a property comprising a house and a surgery. On the retirement of the senior partner the plaintiff agreed to take the defendant into the practice as junior partner and the senior partner agreed to sell the property to the defendant and his wife. The partnership deed made two weeks after the contract for the sale of the property provided that if the defendant ceased to be a partner, he would offer to sell the house and surgery to the plaintiff at a fair market price. The partnership was not successful and the plaintiff gave written notice to the defendant to dissolve the same. He also gave notice that he wished

to exercise the option requiring the defendant to offer the property to him for sale. The defendant however maintained that given the series of events, the option was not exercisable and refused to sell the property to the defendant. The plaintiff then sought specific performance of the option. Again it is clear that there was a concluded and binding obligation entered into between the parties and that one party had reneged on the same, allowing the other innocent party to seek redress in the form of specific performance. In these circumstances, in relation to the award of damages, the court held that damages were to be assessed by reference to the value of the property at the date of the judgment and not at the date of breach of the contract. The plaintiff was also allowed damages for loss sustained in his medical practice by reason of his inability to use the surgery. Unlike the case in *Malhotra v Choudry* there was no concluded contract in the instant case because the 'proposed sale agreement' was never executed. If indeed the sale agreement had been executed and the defendants had then reneged on the same or refused to complete the same, then the measure of damages available to the plaintiff would have been on the bases set out in *Wroth and another v Tyler [1972 W No 274]* and *Malhotra v Choudry* where binding contracts had been entered into. That is not the case here. To such extent the instant case is to be distinguished from this line of cases.

**[25]** The parties before me appear to contend that by reason of the factual matrix set out above, a 'contract' of sorts was found by this court to subsist which was binding. With great respect, in view of the lack of a written judgment it is not clear to the court hearing this appeal that that indeed was the decision of the court. From the orders and the judgment entered it is evident that the court ordered damages and not specific performance. There is no finding expressly made to the effect that a binding and conclusive contract was entered into, or subsisted between the parties. In the local case of *Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672 the issue before the court was whether there was a contract for the sale of a certain piece of land. The court found that through the crucial letters a contract was concluded and awarded nominal damages to the plaintiff. In the instant case the court did not order specific performance but ordered that the plaintiff was entitled to damages to be assessed by the deputy registrar. The issue that arises is whether on the basis of the grant of such a prayer, this court can conclude that the court made a finding that a valid and binding contract existed and that the terms of that contract were breached. It appears to this court that it is not possible to arrive at such a conclusion. As pointed out above, in the instant case, the one point differentiating this case from the line of cases relating to the award of substantial damages in lieu of specific performance, is the clear existence of a binding contract which one party then refused to perform. In the instant case the parties did not enter into the 'proposed sale agreement'. There was no binding agreement in existence which the defendants having agreed to be bound by, then reneged on. Here the defendants held out that they intended to enter into an agreement and then reneged on execution.

As such they never entered into a binding and valid agreement. Their fault was in holding out to the plaintiff that they would enter into the binding agreement and then refusing to do so. By clearly refusing to enter into the contract, it is evident that no contract could have been entered into. Even a perusal of all the relevant contractual documents does not allow for the conclusion that a binding contract was entered into. On the contrary, the evidence before the court is that no binding contract was entered into as the 'proposed sale contract' was never executed. As such the measure of damages available to the defendants cannot be premised on the substantial damages in lieu of specific performance formula to be found in the series of cases above. I am fortified in my conclusion by a consideration of the case of *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 where the second appellant, Rumah Nanas Estate Sdn Bhd had agreed to sell to the respondent, Plenitude Holdings Sdn Bhd land in Johor Bahru for RM47,939,958 for the purposes of development. The first appellant Tan Sri Khoo undertook to obtain a loan for the respondent and gave a further undertaking that in the event he was unable to do so, he and the second appellant would join the respondent in a joint venture to develop the land. The respondent paid a deposit of some RM4.7m but failed to pay the balance purchase price within the stipulated period. The second appellant then terminated the agreement and forfeited the deposit. The High Court held that the termination was not valid and ordered specific performance of the agreement with damages to be assessed. The Supreme Court upheld the decision of the High Court but reversed the order made on the assessment of damages at the High Court level. Again it is noteworthy that a concluded contract was entered into between the vendor and the purchaser. The vendor subsequently terminated the agreement which the court held was wrongful, thereby allowing the purchaser's claim for specific performance of the sale and purchase agreement. As is the case with all the other cases where specific performance was ordered, there was in existence a binding and concluded contract which had been executed by both parties and in respect of which one party had reneged. As stated above, that is not the case in the instant case where no concluded or binding and valid contract was entered into between the plaintiff and the defendants.

**[26]** The fact that the plaintiff and defendants' solicitors contend that that is the case does not and cannot make it so. The fact that the honourable court specifically did not award specific performance but only granted a prayer for damages does not and cannot convert the plaintiff's claim to allow for specific performance of a contract when the contract was not executed between the parties in the first place. Accordingly the measure of damages is the damages lost by the plaintiff as a consequence of the defendants' refusal to enter into the binding contract.

**[27]** It cannot be the measure of damages arising if the contract had been

performed. As such the entirety of the parties' evidence as to the measure of damages payable as if the contract had been performed is, in my view entirely erroneous. The entire basis or premise for the assessment of damages does not exist.

**[28]** If in the instant case, the defendants had executed the contract and then refused to perform it, the plaintiff may well have been able to see damages placing it in a position as if the contract had been performed. But in the absence of a valid and binding contract the basic remedy of specific performance is not available, as there is no contract in existence that ought to be performed. It would be stretching the powers of the court well beyond its scope to say that the court is empowered to order the performance of a contract which was never executed, and which the defendants clearly refused to execute.

**[29]** Accordingly the measure of damages in my view does not extend to a contemplation of the damages claimed by the plaintiff on the basis that the development of parcel A continued as of 15 April 2003 and extended thereafter prospectively resulting in the completion of such a development and the eventual sale of the same resulting in a hypothetical profit of RM20 or RM24m. Neither does it, with respect, extend from the date of breach to the date of judgment such that the contract is deemed performed during that time, as contended by the defendants such that the project was completed during that period with no resultant profit as of 15 April 2003 by reason of the financial debacle in the country in 1998. It appears to this court that both premises undertaken by the plaintiff and the defendants respectively is flawed as they both rest on the premise that the unexecuted contract between the parties that the defendants refused to execute, was in fact executed and continued as if performed. Such competing contentions are flawed because the premise is that the contract was performed when it was not executed and when one party to the contract clearly evinced an intention not to be bound by the agreement. The measure of damages therefore ought to be the damages suffered as a consequence of the defendants' unreasonable refusal to execute the agreement which involves the costs and damages incurred during the period up to and including the 5 November 1997 when the defendants communicated their intention not to execute the proposed sale agreement. This would normally include all legal and financing costs, time cost and opportunity costs arising from the series of negotiations during that period. In a normal sale and purchase agreement, such negotiations would have been preceded by the deposit of some 'earnest' monies or other form of deposit pending the execution of the binding agreement, which would have been available for forfeiture. In the instant case, the parties had not reached the stage of even exchanging any such deposit. Therefore the costs incurred up to that date ought to have been assessed. However the plaintiff provided no evidence of any such costs as the premise for the assessment of damages was entirely different.

Neither did the defendants adopt this position, taking a common position with the plaintiff that damages were to be assessed as of the date of the judgment ie 15 April 2003. The fact that damages are to be assessed as of that date does not alter the fact that in view of the lack of a concluded agreement damages can only be assessed up to the date when the defendants communicated their intention not to be bound by the proposed sale agreement. As there is no such evidence before this court, the only conclusion available to be made is that the plaintiff is entitled to nominal damages of RM10.

**[30]** The manner in which submissions were made over the course of several hearings was quite different from the manner in which I have made my conclusions above. This is because it took some time before I realised that the entire factual scenario in the instant case is quite different from the line of cases quoted to me by both learned counsel for the plaintiff and the defendants. The fact that they had both agreed that damages were to be assessed as at 15 April 2003 and that damages had to be assessed on the basis that the contract was to be treated as having been performed, detracted from the very real fact that no contract was entered into in the instant case. The only difference in their positions was that the plaintiff maintained that damages had to be assessed from 15 April 2003 prospectively as if the project had been successfully completed and completely sold thereby granting a profit of RM20m odd whereas the defendants maintained that damages were to be assessed from the date of breach in November 1997 until 15 April 2003 when the fact of the financial distress in 1998 had to be considered which would have rendered the sale of the completed units untenable resulting in virtually no profit, warranting the grant of nominal damages of binding contract RM10.

**[31]** I had considerable problems accepting the contentions of both learned counsel, as the notion of speculating on the development of commercial project and the sale of all units on it, when no contract was ever entered into troubled me. It appeared to be entirely too speculative. It was only on a mature consideration of the entirety of events that the distinction between the instant case and all the other cases where a concluded contract had already been entered into became clear. As such my conclusions are somewhat different from the line of reasoning and arguments adopted by learned counsel in the course of submissions. I have in effect considered those submissions and am not persuaded by either set of submissions as I believe that neither explains nor provides the rationale for a grant of damages on the basis they claim is correct or valid.

**[32]** Even if I am wrong in so concluding and in fact the true position is that the plaintiff is entitled to damages in lieu of specific performance as contended by the parties, then I would be constrained to accept the rationale or line of reasoning adopted by the defendants rather than the plaintiff. It appears to me

to be wholly implausible to conclude that the plaintiff is entitled to RM20m as a consequence of the defendants' failure to execute the proposed sale agreement. I concur with learned counsel for the defendants, in the event my approach in the last 12 pages is erroneous, that the mode of assessment of damages ought to commence from the date of breach until the date of judgment, ie November 1997 until 15 April 2003. Anything else would render the award of damages speculative. If the contract is to be deemed to be performed then it appears to this court that the reality of events would require a consideration of the practicalities of the financial recession which would have rendered a complete sale of the entirety of the units in the commercial project (if completed) somewhat of a fiction. The fact that the project remains undeveloped until today fortifies my belief further.

**[33]** Finally the fact that two experts gave diametrically opposing views in respect of which no cross-examination was sought, means that it is virtually impossible for the court to make a reasoned choice of the preferred option. In the absence of cross-examination and in the face of disputed evidence, the court is bound to make a decision on the undisputed facts. The net result of the application of this principle (as expounded in *Tay Book Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433) is that the plaintiff has not discharged the onus on it of proving that it has suffered damages in the region of RM20m or more. As such the court is unable to conclude that the plaintiff has made out its case on an assessment of damages. In the circumstances the award of nominal damages appears to be correct and accordingly I uphold the decision of the learned deputy registrar and dismiss this appeal.

*Appeal dismissed.*

Reported by Andrew Christopher Simon